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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ARACELI RESENDIZ,

12 Plaintiff,

13
14 vs.
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17 RECONTRUST COMPANY, N.A., et al.,

18 Defendant.
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CASE NO. 09CV1959 DMS (CAB)

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT AND
GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE A
SECOND AMENDED
COMPLAINT**

[Docs. 10 & 17.]

21 Pending before the Court are Defendant SunTrust Mortgage Inc.'s motion to dismiss Plaintiff's
22 First Amended Complaint ("FAC") and Plaintiff's motion for leave to file a Second Amended
23 Complaint ("SAC"). The Court finds the matters suitable for submission without oral argument
24 pursuant to Local Rule 7.1. For the reasons set forth below, the Court grants both motions.

25 **I.**

26 **BACKGROUND**

27 This case arises out of a loan Plaintiff Araceli Resendiz obtained to purchase real property
28 located in Escondido, California. (FAC ¶ 6.) Plaintiff obtained financing from Defendant SunTrust

1 Mortgage. (Id. at ¶ 7.) Plaintiff ultimately defaulted on the loan and the home was sold in a
2 foreclosure sale on May 12, 2009.¹ (Id. at ¶ 16-17.)

3 Plaintiff filed suit on September 8, 2009 and filed the FAC on December 21, 2009. Defendant
4 filed the motion to dismiss on January 27, 2010. Plaintiff did not timely file an opposition, but moved
5 *ex parte* to file a late opposition. (Doc. 13.) The Court granted Plaintiff's request. (Doc. 16.) On
6 March 10, 2010, the date Plaintiff's opposition was due, Plaintiff filed both an opposition to
7 Defendant's motion and a motion for leave to file a second amended complaint. (Docs. 17-18.)
8 Defendant filed a late reply on April 8, 2010. (Doc. 19.)

9 The FAC alleges four claims for relief: 1) intentional misrepresentation, 2) violation of the
10 Truth in Lending Act ("TILA"), 3) violation of the Real Estate Settlement Procedures Act ("RESPA"),
11 and 4) violation of California Civil Code § 1632.² The proposed second amended complaint drops the
12 § 1632 claim and adds a new party, Diablo Funding Group, Inc. dba Pacific Capital Mortgage
13 ("Pacific"). The SAC adds a fraudulent concealment claim against SunTrust and Pacific, and breach
14 of fiduciary duty and constructive fraud claims against Pacific.

15 II.

16 DISCUSSION

17 A. Motion to Dismiss

18 In two recent opinions, the Supreme Court established a more stringent standard of review for
19 12(b)(6) motions. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v.*
20 *Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under this new standard, "a complaint
21 must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on
22 its face.'" *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility
23 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
24 defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Determining
25 whether a complaint states a plausible claim for relief will ... be a context-specific task that requires

26 ¹ The date of the foreclosure sale is unclear. The proposed SAC states the foreclosure sale
27 occurred on or about June 1, 2009, not May 12. (SAC ¶ 19.)

28 ² The FAC also names Recontrust Company, N.A. as a Defendant. Plaintiff voluntarily
dismissed Recontrust on February 18, 2010. (Doc. 11.)

1 the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950 (citing *Iqbal*
 2 *v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). In *Iqbal*, the Court began this task “by identifying the
 3 allegations in the complaint that are not entitled to the assumption of truth.” *Id.* at 1951. It then
 4 considered “the factual allegations in respondent’s complaint to determine if they plausibly suggest
 5 an entitlement to relief.” *Id.* at 1951.

6 *I. Intentional Misrepresentation*

7 Defendant argues Plaintiff’s intentional misrepresentation claim is not pled with particularity,
 8 as required by Rule 9(b) of the Federal Rules of Civil Procedure. The Court agrees.

9 A pleading will be “sufficient under Rule 9(b) if it identifies the circumstances of the alleged
 10 fraud so that the defendant can prepare an adequate answer.” *Fecht v. Price Co.*, 70 F.3d 1078, 1082
 11 (9th Cir.1995). The same is true for allegations of fraudulent conduct. *Vess v. Ciba-Geigy Corp. USA*,
 12 317 F.3d 1097, 1103-04 (9th Cir. 2003). In other words, fraud allegations must be accompanied by
 13 “the who, what, when, where, and how” of the misconduct charged. *Id.* at 1106. The elements of a
 14 fraud claim are false representation, knowledge of falsity, intent to defraud, justifiable reliance, and
 15 damages. *Id.* When there are multiple defendants, “a plaintiff must, at a minimum, ‘identif[y] the role
 16 of [each] defendant[] in the alleged fraudulent scheme.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 765
 17 (9th Cir. 2007) (citations omitted).

18 The FAC alleges that “Defendants” inserted an inflated income level for Plaintiff on the loan
 19 documents and gave Plaintiff a loan she clearly could not afford. (FAC ¶¶ 25-26.) Further, Plaintiff
 20 alleges Defendants misstated the APR and finance charge and provided Plaintiffs with documents
 21 containing false representations. (*Id.* at ¶¶ 28-29.) These allegations are conclusory and do not specify
 22 which Defendants are at fault, which documents contained the false representations, how they were
 23 false, and by whom at the corporation they were provided.

24 The proposed SAC does not cure the defects. The SAC alleges in a conclusory fashion that
 25 Defendant Pacific, with Defendant SunTrust’s consent, inserted an inflated income level on Plaintiff’s
 26 loan documents. (SAC ¶ 25.) The SAC further alleges that Defendants SunTrust and Pacific failed
 27 to inform Plaintiff of her right to rescind, misstated the APR and finance charges, and misrepresented
 28 that Plaintiff was qualified for the loan. (*Id.* at ¶¶ 26-28.) Although Plaintiff replaced “Defendants”

1 with “Defendants SunTrust and Pacific,” the allegations again do not specify which Defendant made
 2 which misrepresentation, which documents contained the false representations, how they were false,
 3 and by whom at the corporations they were provided. Accordingly, the Court dismisses Plaintiff’s
 4 claim for intentional misrepresentation.

5 2. TILA

6 Plaintiff seeks both damages and rescission under TILA for Defendant’s failure to disclose in
 7 writing two copies of the right of rescission, failure to make written disclosures regarding the amount
 8 being financed, and by engaging in prohibited asset-based lending. (FAC ¶¶ 47-48.)

9 Defendant argues the damages claim under TILA is time-barred by the one year statute of
 10 limitations. 15 U.S.C. § 1640(e). Plaintiff does not oppose this proposition and instead includes the
 11 date of discovery of the TILA violations in the proposed SAC, apparently in an attempt to establish
 12 equitable tolling of the statute of limitations. The loan was obtained June 5, 2007 and Plaintiff became
 13 aware of the alleged violations on August 25, 2009. (SAC ¶ 55.) Although equitable tolling applies
 14 to TILA claims, *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986), Plaintiff’s allegations are
 15 insufficient to overcome the statutory bar. Equitable tolling may arise where there is excusable delay
 16 by the plaintiff. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. Cal. 2000). “Equitable
 17 tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information
 18 bearing on the existence of his claim.” *Id.* There are no allegations to support a claim that Plaintiff
 19 acted with due diligence to learn of the statutory violations.

20 Defendant argues Plaintiff’s claim for rescission fails because a purchase money mortgage is
 21 not subject to TILA’s rescission provisions. Rescission under TILA is not available for a “residential
 22 mortgage transaction,” which is defined as “a transaction in which a mortgage, deed of trust...or
 23 equivalent consensual security interest is created or retained against the consumer’s dwelling to finance
 24 the acquisition or initial construction of such dwelling.” 15 U.S.C. §§ 1602(w), 1635(e). “Thus, while
 25 home equity loans and refinancing transactions could be amenable to rescission, Plaintiff’s purchase
 26 money mortgage is not.” *Watts v. Decision One Mortg. Co., LLC*, 2009 U.S. Dist. LEXIS 54784 at
 27 * 8 (S.D. Cal. June 11, 2009). Plaintiff does not dispute Defendant’s argument. Accordingly,
 28 Plaintiff’s TILA claim is dismissed.

